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Advantages of Commercial International Judgment and the Role of Regional Judgment Centers in Settlement of Commercial Disputes among Developing Countries

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Abstract

International judgment is one of the methods for solving international business and trade disputes whose goal is to fairly solve international business disputes by a neutral institution in the least time with the minimum cost. In recent years, we have witnessed increased reference to this mechanism and also tendency to including obligatory conditions in international business contracts. On the other hand, opposition of developing countries with this mechanism has decreased considerably. Nonetheless, the circumstances leading to opposition from these countries still persist. In this paper, three areas of international arbitration will be considered to see whether arbitration is an effective mechanism to solve disputes for developing countries. Authority of judges as well as control and monitoring of national courts on international business arbitration, and finally cooperation of regional business arbitration centers under the supervision of the Asian-African Legal Consultative Organization (AALCO) will be considered.

Keywords: international business arbitration, developing countries, regional arbitration center, settlement of commercial disputes

Introduction

International commercial arbitration means settling disputes raised from international commerce and trade between a natural person and a legal person, consensual or appointed out of court. In other words, the goal is to achieve a fair solution for disputes by a neutral side without delay or unnecessary cost. In arbitration, parties must be free in settling their disputes. This type of dispute settlement is a compromised method of solving disputes by non-government people votes of which are binding and applicable by courts of justice (Cory, B Born, 1994).

It is clear that developing countries do not deeply agree with the international arbitration. For this lack of interest, some state that these governments consider settlement of disputes concerning contract enforcement, applied mainly in developing countries, as an internal topic and within jurisdiction of their own local courts. This lack of interest is caused by some of these governments' bitter experience in connection with past cases, where they were condemned by international arbitrations.

Nonetheless, in recent years, we have witnessed a significant decrease in oppositions of third-world countries to this method of dispute settlement. Now, what is the reason for this change in trends of developing countries?

In this paper, several areas of international arbitration are considered to determine whether arbitration is an effective mechanism to solve commercial disputes in developing countries. These

areas include arbitrators' authorities and qualifications of local courts to enforce control and supervision on votes of arbitrators. By analyzing these cases, it is attempted to show that judgment in current circumstances still involves many challenges for developing countries. In this regard, the role of local arbitration centers established by the Asian-African Legal Consultative Organization (AALCO) is considered and further need for promotion and development of these organizations is underlined.

Speech 1: Evaluation of legal framework of the international violation arbitration

Modern international business arbitration is known as a suitable and efficient mechanism of dispute settlement and a product of the twentieth century (Choudhery, S.k. Roy, 1996). It was in this era that due to independence of colonial possessions, Western countries learned that diplomacy was no more an influential method for settling their disputes with newly independent countries of the Third World and therefore, they had to resort to international arbitration (Sornarajha, M.). Simultaneous with high growth of global commerce and development of investments after World War II, this method was suggested and developed as an effective method of dispute settlement either in local commerce or in national commerce.

The first step in trying to disqualify local courts and unite a legal regime of international commercial arbitration, desirable for Western countries, commenced with the 1923 Geneva Protocol on arbitration clause and finally led to the International Convention on the Execution of Foreign Awards (Geneva Convention). This convention aimed to widen the scope of Geneva Protocol by providing recognition and enforcement of the protocol within the territory of the contracting governments (not only the government where the decree was issued) (Sornarajha, 1991). There were many problems regarding execution and enforcement of votes in a given country that weakened efficiency of the convention. In fact, in most cases, dominating government had to get a declaration from the country where an arbitration took place, showing that the vote had been applicable there, and deliver it to the courts of the vote enforcement country.

The 1958 Convention on Recognition and Execution of Foreign Arbitration was a step, more effective than Geneva Convention, especially in terms of enforcing foreign arbitration votes because it determined a more effective and simpler method for recognition and execution of arbitration votes. To compensate for and reduce deficiencies and to assimilate local rules regarding arbitration, UNCITRAL institution devised and published a series of sample rules in 1985 regarding international commercial arbitration. The General Assembly recommended in its 40/72 Resolution that all governments pay suitable and special attention to this series of rules with the purpose of uniting legal arbitration procedures and fulfilling international commercial arbitration. This series of rules stated a list of clauses where the court could interfere and supervise the international vote. Burden of proof that the court can enforce its qualification was upon the party that sought enforcement refusal.

Thus, it is observed that tendency toward removal and total exception of international commercial disputes is within territory of authority, control, and supervision of local legal regimes of developing countries. Many countries and arbitration institutes have devised rules based on the UNCITRAL model, making UNCITRAL rules international laws under international consensus in the area of international commercial arbitration.

Paragraph one: advantages of arbitration for the developing countries

Law of international commercial arbitration and interests of developing countries: one of the important advantages of arbitration is its predictability regarding place, rule of vote, rules of procedure, scope, parties, language and certainty of vote, conformity with demands and needs of

contract parties including confidentiality, and choosing arbitrators based on expertise and experience, speed and cost, easier trial procedure, less disputes and limited appeal. However, it seems that in fact, this claimed advantage is effective in local courts and in reality, it fulfills commercial advantages of Western countries and moves in a direction opposite to the advantages of the developing countries. Studying each one of stated terms by case also confirms this, as considered in the following sections.

Quick settlement of commercial disputes: One of the stated advantages regarding arbitration is that is more quickly solves business disputes of parties than superior deals (deals that are longer and have more formalities). But, it is observed that no such advantage exists anymore, as achieving arbitration vote both requires a lengthy time procedure, and also trial delays and complexities during arbitration have increased.

Arbitration is an informal and friendly method of settling disputes: This theory also is not true anymore. In recent years corporate model of U.S. law for offering legal services in the European market, has led to increased legal escalations and leaving traditional models (Shalakani, Amr A., 2000). This is led to increased trial formalities and exiting friendly state.

Arbitration, a cost-efficient method of dispute settlement: The institute of international arbitration becomes similar to a high-paying service industry each day more than before. Arbitration cost in comparison with legal trial costs in the developing countries is very shocking. Lack of qualified experienced experts in these countries makes parties employ Western attorneys with high costs and staggering honoraria.

Dispute settlement by expert people (expert arbitrators): Disputes and oppositions raised from agreements of international investments are very complex and require sufficient acquaintance and expertise of arbitrators with technical and commercial topics. The fact, however, is that majority of these arbitrators are chosen from among attorneys, legal scientists and judges. Many expert people are only summoned to judgment as witnesses because they only have to participate in trials of local courts (Shalakany, Amr A.).

Confidentiality of the trial procedure: The best trial advantage is that it is not always guaranteed because no regulation exists in any international document in this regard. The High Court of Australia mandated in the case of *Esso Australia Resources Ltd. V. Plowman* that no implicit contractual condition applies regarding confidentiality.

It, therefore, seems that its sole arbitration advantage in creating a legal method is to de-authorize national law-setting institutes. The question encountered here is why we're facing a change in the trend of Third Worlds regarding business arbitration. The first and most important reason for uneven trade power of developing countries is that they were exporters of raw products and materials. Secondly, they had to create desirable conditions for foreign investment. Therefore, if they are seeking to attract foreign investors, they must also welcome international arbitration (Geneva Protocol, 1923).

Second paragraph: authorities of arbitrators

According to arbitration rules, broad power has been given to arbitrators. This obstinate enforcement of authorities, inversely affects developing countries, especially when the majority of arbitrators are from Western countries. These broad authorities affect the integral property of international judgment i.e. neutralism and also affect the choice of arbitration place, arbitration language, and judge's rule, all of which can be in contrast to the will of developing countries. This authority can significantly decrease with the agreement between parties. Given the inequality of trade power, a country of the Third World cannot always express all its words and demands in a contract (Rhodes & Sloan, 1984). Arbitrator choice is the most important part of arbitration. Since

all possibilities cannot be predicted in the contract, the main control is assigned to the arbitrator's vote and discretion (Ibid). According to UNCITRAL arbitration rules, arbitration can be specified according to agreement between parties (UNCITRAL Model Law, 1985). By presence of each of the parties, the other party can ask the court or other institutes to choose arbitrators (Shalakani).

Paragraph three: discretion of contract parties in determining qualification

Article 1 of arbitration rules states two important and challenging principles of *Kompetenz-Kompetenz* and the principle of separation or independence of arbitration clause. The effect of the first principle is reduction and interrupting of a party in practice with their own will until issuance of vote. On the other hand, separation shows former separation of arbitration clause from the contract in which this is incorporated, resulting in permanent jurisdiction of the arbitration court in dealing with all disputes caused by the contract, even if the contract based on which an agreement for reference to arbitration has been made. The goal of this regulation is to recognize and execute immediately local arbitration votes.

Paragraph four: power of determining intrinsic rules and a form practicable on arbitration and contract

In lack of an opposite contract, the regulation of arbitration procedure will be according to the law of the country where arbitration occurs. However, the arbitration procedure regulation gives wide authorities to the arbitrator in determining acceptability or non-acceptability, relationship and value of evidences and witnesses (UNCITRAL Model Law, 1985). International commercial arbitration is an external element leading to challenges in choosing dominant rule and the jurisdiction of the court. Although, in practice, it is the parties that determine the rule dominating the contract, in lack of an explicit regulation in this regard, the term *proper law of contract* means that regarding opposition caused by a contract, law of the country with which the contract is more closely connected, is regulated and by resorting to that country's international private law, the rule dominating nature of the case will be specified. Here, although special guiding principles have been set for local courts with the purpose of decree issuance, the arbitrator has broad jurisdiction concerning suitable contract rule (Singar Corp., 1993). Value, credibility, and interpretation of arbitration contract is also considered according to proper contract rules. By separating the contract from arbitration clause, a proper practicable rule can also be separated unless parties agree on something opposite. This has given broad jurisdiction to arbitrators to set the law dominating arbitration. On the other hand, in a condition that a contract-specific rule is chosen by the parties, such a rule in absence of violation intention must rule the arbitration contract that is annexed to the main contractor which is peripheral and yet is executed as part of such a contract.

Paragraph five: choosing arbitration place

In general, choosing arbitration place answers several questions: Which rule controls the arbitration flow? What subjects can be put under arbitration? Who are arbitrators? How must the arbitration flow be performed? Choosing the arbitration place is important because it is where decree is issued and in recognition and enforcement of the trial regulations this is also eligible. Also, to enforce article 36 (1)(a)(V) if parties prove that the arbitration vote issued by the court of that place is cancelled or annulled, they can dismiss it.

Another regulation that gives extreme interpretation power to arbitrators is article 28 (3) and (4) that deals with enforcement of the principle of fairness and the use of trade. Use of the principle of fairness, is the ineligibility to file an appeal for the issued vote (Fraser, 1998). This principle also allows arbitration court to ignore explicit contractual terms and issue votes by enforcing general principles of justice and fairness. Regarding the use of trade in terms of trades, many of these uses

have been developed by Western commercial procedures, which can work against the interests of developing countries, because of unequal status and disparate contribution in international trade.

Therefore, we are witnessing that the arbitration contract is resulted from unequal trade power, arbitration court, and combinations thereof according to requests of strangers by applying broad considerations that distort interests of the developing countries.

Paragraph six: court's power to control and supervise

In the discourse of international arbitration, court's authority in caring, interfering, supervising, controlling, and recognition and execution capability have always been discussed. In recent years, further authorities have been given to arbitration institutes and processes in freedom from legal interference (Kerr, 1985). Its main reason has been to enforce pressure for intrinsic union and unity of national rules and arbitration procedure regulations. In this regard, UNCITRAL arbitration rules formed. The question, however, is whether we can accept an arbitration regime without courts' interference so that legal courts are not eligible to cancel or review the vote. It seems that UNCITRAL's arbitration rules can be helpful.

The first step of arbitration regulations is to constrain courts in dismissing or canceling arbitrator's vote by bestowing the broadest meaning possible to such terms as *arbitration contract* and *commercial.* Though the term *commercial* is unclear and ambiguous, UNCITRAL's arbitration rules have stated that this term get a wider interpretation to cover all topics with business nature, either contractual or non-contractual, and this interpretation will not be limited to mentalities and attitudes of national courts regarding this term.

These regulations accept the interference of courts in limited cases beyond which, courts will not be eligible to meddle in affairs under the rule of this law.

A) **Appointment, disqualification, arbitrators' mission accomplishment**

If there is dispute regarding arbitrator selection between parties, the arbitration party can request the court or other institutes to choose an arbitrator. But when he/she was chosen there are only limited reasons for her disqualification. One such case is her *lack of independence or lack of impartiality*. It should be noticed that there are rifts between lack of independence and lack of impartiality. According to the UK Arbitration Act, however, just lack of impartiality can be the basis of objection to arbitrator selection. Article 12(2) of UNCITRAL Arbitration Act Sample states: the arbitrator can be disqualified only when existing circumstances produce admissible doubts regarding her impartiality or independence, or if he lacks some characteristic agreed upon by the contract parties. One party can disqualify an arbitrator they have appointed just for reasons they learned after appointment.

Therefore, arbitrator disqualification for her lack of independence and impartiality is a right, and it is required that in each arbitration, parties recognize well the arbitrator in order to be able to use this right of their own towards her.

B) **Decision making regarding jurisdiction of the arbitration bureau**

Jurisdiction of arbitration bureau to issue decrees regarding its own qualification is subject to the court's control. Discrepancies over qualification must be solved within 30 days, and the court's verdict could not be appealed to. Furthermore, arbitration bureau is eligible to continue procedure and announce votes as long as the subject is being suspended and observed in court.

C) **Canceling arbitration verdict**

UNCITRAL Act Sample is limited to series of reasons based on which the vote issued by court can be protested. Conditions for arbitration vote enforcement is mostly to the benefit of the party that seeks verdict enforcement. The party that seeks verdict non-enforcement, must show reasons for its non-enforcement. Probably, one of the main reasons of not enforcing court verdict,

which the court can rely on as a criterion, is public order exception that should, of course, be interpreted limitedly.

D) Temporary proceedings regulated by the court

The court is also eligible to enforce temporary proceedings for the parties in limited cases including temporary order or other care proceedings in international arbitration. Specifically, in an Indonesian case, according to UNCITRAL rules, the arbitration rule regulated a temporary vote against the state-owned Indonesian Electricity Company.

Speech two: the role played by regional arbitration centers of the Asian-African Legal Consultative Organization

This organization (AALCO) has realized the importance of international commercial arbitration for developing countries, and sensed the need for improving arbitration procedures, necessity of organizational supports, improvement, experience, and necessary expertise and creation of regional institutes for arbitration in Asia and Africa (Chimni, 1983). These needs and expectations lead to directing and processing of future business arbitration in a way that creates regulations that consider requirements and concerns as well as problems of developing countries. Although some Asian and African countries have regulated refusal in their local rules and created national arbitration institutes, need for creation of regional arbitration centers to fulfill vital needs of this region is being sensed. In this regard, the Asian-African Legal Consultative Organization endorsed recommendations of the peripheral committee of commercial rights that tries, through its member governments, to expand organizational arbitration in Asian and African regions and that has regional networked centers for arbitration, subject to supports and auspices of the organization in different parts of Africa and Asia. Thus, cases and dossiers of organizational arbitration outside of Asia-Africa region can decrease. Following these goals, the organization formed four regional organizations with cooperation of membered governments:

1- Kuala Lumpur Regional Arbitration Center (KLRAC) (1978)
2- Cairo Regional Center for International Commercial Arbitration (CRCICA)
3- Lagos Regional Center for International Commercial Arbitration (1980) (LRCSCA)
4- Tehran Regional Arbitration Center (TRAC)

These regional centers provide facilities and supports for the procedure of arbitration process, including execution of supervised verdicts and support of the center. These centers devised regulations regarding arbitration that is, in fact, a corrected version, excerpted from UNCITRAL arbitration regulations. Of course, according to these rules, parties were even eligible to refer simultaneously to other mechanisms such as conciliation and mediation. Besides, these centers provide consulting services regarding international trade and investment contracts for holding such contracts. Over many years, a considerable increase has happened in the number of local and international arbitrations referred to these centers. Nonetheless, to achieve desirable and ambitious goals for which these centers have been created, further works must be done. Both private institutes and state-owned ones must make use of proceedings and approaches to enhance activities of these centers to make them primary institutes for arbitration. Achieving these goals can be done by incorporating the arbitration clause for dispute settlement according to arbitration rules of these centers, not only in contracts where government and public corporations are on one side, but also in contracts where private institutes are on one side.

Conclusions

Despite claims stated regarding commercial international arbitration for developing countries including quickness, friendliness and unfriendliness, less cost, etc., it is concluded from the

abovementioned statements that there are no claimed arbitration interests on judicial proceeding in a practical level, and current works and proceedings are not to the benefit of developing countries, but to the advantage of developed countries and obtained and carried out by them. The goal of these rules is protect investments of developed countries in developing countries and prevent them exercise of sovereignty, which endangers finances of developed countries in developing countries.

Therefore, it seems that developing countries must, instead of waiting for a comprehensive and mandatory international system, exercise proceedings with the purpose of familiarizing their commercial community with arbitration rifts and traps, as mentioned earlier in several examples. Nonetheless, attempts must persist on creating and promoting regional centers in order to reduce dominance of Western arbitration centers and organizations. Therefore, arbitration centers established by the Asian-African Legal Consultative Organization have created a cheaper and fairer trend for regional dispute settlement. If developing countries seek to increase the efficiency of international arbitration for themselves, it is mandatory that all attempts aim to increase the number of these centers and similar organizations, because the practical trend of these centers has shown that they can fulfill interests of developing countries in terms of arbitration.

Finally, it could be stated that appointing proper arbitration mechanisms can lead to fulfillment of interests for both parties and prevent violation of rights of developing countries. This, of course, requires further endeavors of these countries and adopting an active diplomacy as well as expanding regional cooperation.

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